No. 89-523

In the Supreme Court of the United States

October Term, 1989

BERMUDA STAR LINE, INC.,

Petitioner,

v.

JOHN SPYRIDON MARKOZANNES,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

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INTEREST OF AMICI CURIAE

Both amici are composed principally of lawyers whose political and professional concerns center on the rights of injured persons. They try to work with Congress, the state legislatures, and the courts to insure consistency and continuity in the law affecting the rights of injured persons, including injured seamen. Their interest in the present case is persuading the Court to approach the narrow procedural point presented here informed by two fundamental propositions, both well articulated by Professor Alexander Bickel in his article, *The Doctrine of Forum Non Conveniens As Applied In The Federal Courts in Matters of Admiralty: An Exercise In Uncontrolled Discretion*, 35 Corn.L.Q. 12 (1949). "The courts in

a very real sense consider seamen to be their wards and the objects of their protection." (p. 20) "[It] follows from the existence of jurisdiction in the first place, that a case will be retained whenever it is not perfectly clear that plaintiff can recover elsewhere if the facts he alleges are true." (p. 28)

ARGUMENT

Louisiana has decided to keep its courts open for Jones Act cases, provided there is jurisdiction.[1] In *Mis-*

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[1] *Forum non conveniens* in its modern guise allows a court with acknowledged and uncontested jurisdiction over a case to refuse (as a matter of discretion) to hear it, on the ground that trying the case would be too inconvenient either to the court or to the defendant. See generally D. Robertson, *Forum Non Conveniens in America and England*, 103 L.Q. Rev. 398 (1987). This "doctrine" gives trial judges a very broad discretion to dismiss cases on the amorphous "inconvenience" basis. It was invented by Anglo-American judges. See *id.* at 411-12 & n. 104; Stein, *Forum Non Conveniens and the Redundancy of Court-Access Doctrine*, 133 U.Pa.L.Rev. 781, 796-98 (1985). It has no counterpart in any civilian jurisdiction (103 L.Q.Rev. at 426 & n. 197) and is nowhere codified.

In its procedural law and history Louisiana is fully civilian. Louisiana has no tradition of discretion to decline jurisdiction, and no concept of judicial discretion unfettered to a procedural code. Its procedural system is fully codified. See H.G. McMahon, *A Short History of Louisiana Civil Procedure*, Vol. 1 of West's LSA Civil Procedure LXV—LXXXI, at pp. LXXIX-LXXX (1960). The realization that Louisiana's civil procedure system is fully codified was at the heart of *Kassapas v. Arkon Shipping Agency, Inc.*, 485 So.2d 565 (La.App.5th Cir.), *writ ref.*, 488 So.2d 203 (La.1986), *cert. den.*, 479 U.S. 940, 107 S.Ct. 422 (1986). The *Kassapas* holding is clear and unequivocal: There is no such doctrine as *forum non conveniens* in the law of Louisiana. 485 So.2d at 566-67.

After the *Kassapas* decision the Louisiana legislature amended Code of Civil Procedure art. 123 to add a limited form of the *forum non conveniens* doctrine to Louisiana law. (Before the amendment

souri ex rel. Southern R. Co. v. Mayfield, 340 U.S. 1, 71 S.Ct. 1 (1950), this Court held that states are free to keep their courts open for FELA cases:

> "According to its own notions of procedural policy, a State may reject, as it may accept, the [*forum non conveniens*] doctrine for all causes of action begun in its courts."
>
> 340 U.S. at 3.

Inasmuch as the Jones Act "is based upon and incorporates by reference the [FELA],"[2] the decision in *Mayfield* ought to be dispositive here.

C.C.P. art. 123 dealt solely with transferring cases from one Louisiana forum to another.) Act 818 of 1988 enacted the following provisions:

> "B. Except as provided in Paragraph C, upon the contradictory motion of any defendant in a civil case filed in a district court of this state *in which a claim or cause of action is predicated solely upon a federal statute* and is based upon acts or omissions originating outside of this state, when it is shown that there exists a more appropriate forum outside of this state . . . the court may dismiss the suit. . . .
>
> "C. The provisions of Paragraph B *shall not apply to claims brought pursuant to 46 U.S.C. §688 [the Jones Act] or federal maritime law.*" [Italics added.]

There is no ambiguity in the 1988 legislation; it limits *forum non conveniens* dismissal to certain federal statutory claims and expressly excludes Jones Act and general maritime law claims from the reach of the limited *forum non conveniens* doctrine it inaugurates. The present case is a Jones Act and general maritime law case. Thus by the express terms of Paragraph C of C.C.P. art. 123 it is not subject to *forum non conveniens* dismissal.

[2] *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 63 S.Ct. 246 (1942).

But petitioner argues for treating Jones Act cases differently from FELA cases because Jones Act cases are part of the admiralty or maritime law. The essence of petitioner's argument is that there exists a substantive doctrine of *forum non conveniens* that (a) "is a deeply-rooted feature of the [federal] admiralty law"[3] and (b) should be imposed on the states on the basis of this Court's "reverse-*Erie*"[4] doctrine of maritime-law preemption.

* * * * *

Both of petitioner's propositions are mistaken. As to the first: Before this Court's decision in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 67 S.Ct. 839 (1947), all of the federal-court *forum non conveniens* decisions had been admiralty and equity cases.[5] Thus in a limited sense one could say during that era an admiralty doctrine of *forum non conveniens* did exist. Note, however, that this early admiralty doctrine was widely regarded as unsatisfactory. In the article by Professor Bickel on which petitioners place central reliance, it is said that "the admiralty experience [with *forum non conveniens*] is believed not to have been a happy one."[6] Professor Bickel subtitled his article "An Object Lesson In Uncontrolled Discretion."[7]

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[3] Certiorari Petition at 9.

[4] *Chick Kam Choo v. Exxon Corp.*, 486 U.S. ____ , 108 S.Ct. 1684, 1689 (1988). See also D. Robertson, *Admiralty and Federalism* 195 (1970).

[5] See Justice Black's dissent in *Gilbert*, 330 U.S. at 513-14.

[6] Bickel, *The Doctrine of Forum Non Conveniens As Applied In The Federal Courts In Matters Of Admiralty*, 35 Corn. L.Q. 12, 13 (1949).

[7] Bickel's criticism of the old admiralty doctrine—too much discretion, too unfocused and too uncontrolled—parallels Judge Friendly's criticism of the modern federal doctrine in *Indiscretion About Discretion*, 31 Emory L.J. 747, 748-54 (1982).

After the *Gulf Oil* decision *forum non conveniens* became a general venue doctrine of the federal courts. Whatever particularized admiralty features that may once have existed were subsumed into the general federal-court *forum non conveniens* jurisprudence.[8] Certainly since this Court's decision in *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 102 S.Ct. 252 (1981), it has been clear that there is no admiralty *forum non conveniens* doctrine as distinct from the general federal-court *forum non conveniens* doctrine. Indeed, the Fifth Circuit Court of Appeals, en banc, went out of its way in a recent case to hold that an erstwhile feature of *forum non conveniens* practice that had been limited to admiralty cases was supplanted by the *Piper Aircraft* decision.[9]

This Court has never answered the question whether *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817 (1938), obliges federal diversity courts to follow state *forum non conveniens* law, but the lower federal courts are in substantial agreement that it does not. They have held that the federal *forum non conveniens* doctrine is *procedural* for purposes of the "general rule [of *Erie*] that federal diversity courts 'apply state substantive law and federal procedural law.'"[10] The Fifth Circuit Court of Appeals' en banc decision in *In Re Air Crash Disaster Near*

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[8] See Speck, *Forum Non Conveniens and Choice of Law in Admiralty: Time for an Overhaul*, 18 J.Mar.L. & Com. 185, 185-86, 189-90, 198-99 (1987).

[9] *In Re Air Crash Disaster Near New Orleans, La.*, 821 F.2d 1147, 1163 & n. 25 (5th Cir. 1987), vacated and remanded on other grounds *sub nom. Pan American World Airways, Inc. v. Lopez*, — U.S. ——, 109 S.Ct. 1928 (1989).

[10] *In Re Air Crash Disaster*, *supra* note 9, 821 F.2d at 1155.

New Orleans, La., 821 F.2d 1147, 1159 (5th Cir. 1987)[11] spelled it out:

> "[T]he interests of the federal forum in self-regulation, in administrative independence, and in self-management are more important than the disruption of uniformity created by applying federal *forum non conveniens* in diversity cases."

See also *Sibaja v. Dow Chemical Co.*, 757 F.2d 1215 (11th Cir.), *cert. den.*, 474 U.S. 948, 106 S.Ct. 347 (1985). The *Sibaja* court also concluded that federal courts are not bound by the state law of *forum non conveniens*, explaining that federal *forum non conveniens* is part of a district court's "inherent power under Article III of the Constitution to control the administration of the litigation before it," analogizing it to "the court's inherent power to punish contempt," and observing that "[t]he Court's interest in controlling its crowded docket also provides a basis for the Court's inherent power to dismiss on grounds of *forum non conveniens*." 757 F.2d at 1218. The *Sibaja* court concluded:

> "The *forum non conveniens* doctrine is a rule of venue, not a rule of decision."
>
> 757 F.2d at 1219.

* * * * *

Turning to *petitioner's second proposition:* The doctrine that holds state courts obliged to follow the federal courts of admiralty on matters of maritime law is generally called the "reverse-*Erie*" doctrine:[12]

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[11] Vacated and remanded on other grounds *sub nom. Pan American World Airways, Inc. v. Lopez*, ____U.S. ____, 109 S.Ct. 1928 (1989).

[12] See text and note 4, *supra*.

> "It has been universally and correctly assumed that state procedural rules govern actions in state courts under the 'saving to suitors' clause—the 'reverse-*Erie*' metaphor captures this assumption perfectly."[13]

We have just seen that federal diversity courts are free under *Erie* to ignore state *forum non conveniens* law (treating it as non-applicable local procedure) in order to exercise their own "inherent powers"; control their own dockets; and assert their own "interests in self-regulation, in administrative independence, and in self-management." This Court's recent decision in *Sun Oil Co. v. Wortman*, 486 U.S. ____ , 108 S.Ct. 2117 (1988), makes it clear that state courts have interests and powers of roughly identical stature and scope. *Sun Oil Co.* held that, even though the Full Faith and Credit and Due Process clauses forbade a state's applying its own substantive law to certain matters in which it had no significant interest, the state's courts were free to apply their own statute of limitations to those very matters:

> "Since the procedural rules of its courts are surely matters on which a State is competent to legislate, it follows that *a State may apply its own procedural rules to actions litigated in its courts.*"[14]
>
> A State's interest in *regulating the work load of its courts* and determining when a claim is too stale to be adjudicated certainly suffices to give it legislative jurisdiction to control the remedies available in its courts by imposing statutes of limitations."[15]

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[13] *Exxon Corp. v. Chick Kam Choo*, 817 F.2d 307, 310 (5th Cir. 1987), *rev'd on other grounds*, ____U.S. ____ , 108 S.Ct. 1684 (1988).

[14] 108 S.Ct. at 2122. Emphasis added.

[15] 108 S.Ct. at 2126. Emphasis added.

The premises of the *Sun Oil Co.* decision are clearly antithetical to petitioner's argument. The situations are perfectly parallel: Just as the state court in *Sun Oil Co.* was free to apply its own procedural rules (including statutes of limitations) although constitutionally obliged to follow another system's substantive law, so is the state court in the present case free to apply its own procedural rules (including its own concept of *forum non conveniens*) although constitutionally obliged to follow another system's (admiralty's) substantive law. The *Sun Oil Co.* decision seems dispositive of the present case.

Petitioner would have the Court abandon the settled understanding of "reverse-*Erie*," introduce a doctrine that denigrates the stature and independence of the state courts vis-a-vis the federal courts, and contradict the premises and philosophy of *Sun Oil v. Wortman*—all in the interest of "the uniformity of the general maritime law."[16] But forcing the state courts to adopt the federal *forum non conveniens* doctrine would achieve no meaningful uniformity. It is widely conceded that there is little or no uniformity in the federal courts' reactions to *forum non conveniens* pleas in maritime and other cases. On the contrary, what has resulted is "a crazy quilt of ad hoc, capricious, and inconsistent decisions."[17] The federal *forum non conveniens* jurisprudence has been aptly described as "notoriously complex and uncertain," with no predictability or uniformity at all.[18] It is noteworthy that the Su-

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[16] Petition for Certiorari at 9.

[17] Stein, *Forum Non Conveniens and the Redundancy of Court-Access Doctrine*, 133 U.Pa.L.Rev. 781, 785 (1985).

[18] Currie, *Change of Venue and the Conflict of Laws*, 22 U.Chi.L.Rev. 405, 416 (1955). For similar criticisms of the doctrine,

preme Court of Australia recently refused to adopt a doctrine of broad *forum non conveniens* discretion on the American model, relying in major part on the arguments set forth by American scholars critical of the federal courts' doctrine. *Oceanic Sun Line v. Fay* [1988] 79 A.L.R. 9, 40, 47.[19]

* * * * *

The fact that the federal doctrine of *forum non conveniens* brings no significant uniformity or predictability to the treatment of cases like the present one is ample reason for this Court to decline the invitation to impose that doctrine on the state courts. A closely related reason for declining the invitation is simply that the federal doctrine is not well-enough formulated and defined to be suitable for promulgation as the required law of the land. This Court's "reverse-*Erie*" decisions over the years have not been easy to understand and reconcile in all respects.[20] But one strand seems fairly clear: State law has normally been deferred to when the federal maritime law has not developed a clearly defined rule. It is believed that

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see Friendly, *Indiscretion About Discretion*, 31 Emory L.J. 747, 748-54 (1982); Robertson, Forum Non Conveniens in America and England, 103 L.Q. Rev. 398 (1987); Speck, *Forum Non Conveniens and Choice of Law in Admiralty: Time for an Overhaul*, 18 J.Mar.L. & Com. 185 (1987).

[19] Note also that a handful of very recent decisions arguably indicates that some of the lower federal courts are turning away from the broad jurisdiction-declining discretion that has been at the heart of federal *forum non conveniens* during its recent heyday. See *Lony v. E.I. Dupont*, 886 F.2d 628 (3d Cir. 1989); *Lacey v. Cessna Aircraft Co.*, 862 F.2d 38 (3d Cir. 1988); *Carlenstolpe v. Merck & Co.*, 817 F.2d 33 (2d Cir. 1987).

[20] See G. Gilmore, *Book Review of D. Robertson's Admiralty and Federalism*, 38 U.Chi.L.Rev. 431 (1971).

this consideration explains *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 346 U.S. 310, 75 S.Ct. 368 (1955) (upholding the application of state law to a marine insurance policy), and *Madruga v. Superior Court*, 346 U.S. 556, 74 S.Ct. 298 (1954) (upholding state court jurisdiction over actions to partition ships). The same philosophy reflected in *Wilburn Boat* and *Madruga*—avoiding imposing a generalized solution from on high unless it has been proved out as reasonably sound—argues for denying the present petition for certiorari.

* * * * *

The legitimate aims of maritime-law uniformity in the present context are served by the choice-of-law doctrines set forth in this Court's trilogy of cases dealing with the applicability of the Jones Act and the American general maritime law to foreign seamen.[21] No one doubts that these doctrines—which tell the courts of America whether to apply the remedies afforded by U.S. substantive maritime law in cases brought by foreign seamen—are equally as binding on the state courts as on the federal.[22] Thus if petitioner is right in its claim that allowing respondent to sue on the basis of American law is an unwarrantable disruption of maritime commerce, the state court's application of the controlling choice-of-law doc-

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[21] *Lauritzen v. Larsen*, 345 U.S. 571, 73 S.Ct. 921 (1953); *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 79 S.Ct. 468 (1959); *Hellenic Lines Ltd. v. Rhoditis*, 398 U.S. 306, 90 S.Ct. 1731 (1970).

[22] See, e.g., *Symeonides v. Cosmar Compania Naviera, S.A.*, 433 So.2d 281, 284-85 (La.App.), *writ ref.*, 440 So.2d 731 (La.1983), *cert. den.*, 465 U.S. 1079 (1984); *Jackson v. S.P. Leasing Corp.*, 774 S.W.2d 673, 678 (Tex.App. 1989).

trines can be expected to avoid such disruption. (In point of fact, however, this Court's decision in *Hellenic Lines Ltd. v. Rhoditis*, 398 U.S. 306, 90 S.Ct. 1731 (1970), probably means that *any* American court that addressed the choice-of-law features of the present case would conclude that respondent is entitled to go forward on the basis of the Jones Act. In this connection note the *Rhoditis* decision's emphasis on the alien shipowner's base of operations together with the present petitioner's concession that "its principal place of business [is] in New Jersey." Petition for Certiorari at 6. A long time ago Professor Bickel reminded us that it "follows from the existence of jurisdiction in the first place that a case [should] be retained whenever it is not perfectly clear that plaintiff can recover elsewhere if the facts he alleges are true."[23] The federal courts have strayed far from this principle, but it would be harsh indeed to insist that the state courts do likewise.)

* * * * *

Finally, it should be noted that there is almost no authority for the proposition petitioner propounds. Petitioner's authority consists entirely in two panel opinions from the Fifth Circuit Court of Appeals. The more recent one, *Camejo v. Ocean Drilling & Exploration*, 838 F.2d 1374, 1382 (5th Cir. 1988), is merely a dictum reiteration of the conclusion of the writing judge in the earlier Fifth Circuit panel decision, without comment or analysis. In the earlier case, *Exxon Corp. v. Chick Kam Choo*, 817

[23] Bickel, *The Doctrine of Forum Non Conveniens As Applied In the Federal Courts in Matters of Admiralty: An Object Lesson In Uncontrolled Discretion*, 35 Corn.L.Q. 12, 28 (1949).

F.2d 307 (5th Cir. 1987), Judge Gee wrote an opinion that no other member of the court fully joined. He began by acknowledging the black-letter view of "reverse-*Erie*" as described above:

> "It has been universally and correctly assumed that state procedural rules govern actions in state courts under the 'saving to suitors' clause—the 'reverse-*Erie*' metaphor captures this assumption perfectly." 817 F.2d 319.

Nevertheless Judge Gee went on to conclude that state courts hearing maritime cases are obliged to follow the *forum non conveniens* practices of federal admiralty courts. (In so doing, Judge Gee went far out of his way to declare the Louisiana decision in *Kassapas*, *supra* note 1, to be "wrong." 817 F.2d at 324. This was an unusual operation for a lower-court federal judge to perform on a state-court decision, especially one in which both the state supreme court and this Court had denied certiorari.)

Neither of the other members of the *Chick Kam Choo* panel subscribed to Judge Gee's reasoning. Judge Gee arrived at his conclusion (that federal forum non conveniens practices must be followed by state maritime courts) in the course of upholding a federal-court injunction prohibiting a state court from hearing a maritime case. Judge Reavley dissented from Judge Gee's reasoning and from the decision upholding the injunction: "It is for the Texas court to decide its own forum convenience and to identify the issues subsidiary to that determination." 817 F.2d at 325. Judge Clark agreed that the injunction was proper in the narrow circumstances of the case but, as was recently pointed out by the Ninth Circuit, "he did not concur in Judge Gee's *forum non conveniens* analysis." *Zip-*

fel v. Halliburton Co., 832 F.2d 1477, 1489 (9th Cir. 1987), *cert. den.*, 108 S.Ct. 2819 (U.S. 1988).

In *Chick Kam Choo v. Exxon Corporation*, 486 U.S. ____ , 108 S.Ct. 1684 (1988), this Court reversed Judge Gee's decision upholding the injunction, but did so on narrow grounds that expressly did not reach his *forum non conveniens* reasoning. See 108 S.Ct. at 1691.

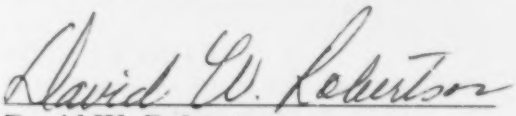
CONCLUSION

There is very sparse lower-court authority for imposing a procedural doctrine like *forum non conveniens* on the state courts and very strong authority looking the other way. This Court's decisions in *Missouri ex rel. Southern R. Co. v. Mayfield* and *Sun Oil Co. v. Wortman* show that state courts are generally free to employ their own *forum non conveniens* and other procedural doctrines in contexts in which the controlling substantive law is federally mandated. The lower federal courts have consistently held that *forum non conveniens* is procedural for purposes of the rule of *Erie R. Co.*; they have justified that conclusion by extolling the federal courts' "interests in self-regulation, administrative independence, and self-management." A decent recognition that state courts have similar interests will characterize *forum non conveniens* as procedural for purposes of the reverse-*Erie* rule as well.

There are strong policy arguments against forcing *forum non conveniens* on the states. It is the kind of amorphous and uncertain doctrine deemed unsuitable for imposition on the states in this Court's *Wilburn Boat* and *Madruga* decisions. Within the federal court system the

federal *forum non conveniens* doctrine does a poor job of protecting the uniformity interests it is urged as furthering. Such interests are in any event protected to some extent by substantive choice-of-law doctrines that bind state courts. For all these reasons the petition for certiorari should be denied.

Respectfully submitted,



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